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> Giving prisoners the vote is a question of moral conscience not political conscience. . . . If prisoners are excluded from voting, then we don't have a democratic society — we are just playing lip service to one. The government must accept that prisoners remain citizens of this country with legitimate human rights, including the right to vote.[1]

Introduction

Today, approximately 3.9 million adult United States citizens — roughly two percent of the national population eligible to vote — are barred from voting booths every election.[2] In today's polarized political society, the vote of two percent of the people can swing a single representative election from one candidate, or one party, to another, or a voter referendum from "for" to "against." Most notably, that same two percent could swing control of the White House, the Senate, or the House of Representatives into one party's corner. There can be no more telling example of this than the 2000 Presidential election of former President George W. Bush and former

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1. THE SENTENCING PROJECT - DISENFRANCHISEMENT NEWS, http://www.sentencingproject.org/detail/news.cfm?news_id=874&id=133 (last visited Nov. 30, 2010).

2. George Brooks, *Felon Disenfranchisement: Law, History, Policy & Politics*, 32 FORDHAM URB. L.J. 851, 872 (2005) (citing Michael J. Gottlieb, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1940 (2002); Brian Pinaire, et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1520 (2003)).

Vice-President Al Gore, where control of the White House was determined by less than 600 votes in the state of Florida.[3] Although the right to vote has always been considered one of the most fundamental rights of the citizens of this country,[4] and in modern society, it has been considered inherent to almost every citizen,[5] during every period of this nation's history, convicted criminals, in one form or another, have always been excluded from the election franchise.[6]

Early American voting rules disenfranchised more than just convicted felons; over time, however, voting restrictions against African Americans, Native Americans, women, those without property, and the mentally ill, fell by the wayside.[7] The Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments abolished voting restrictions based on race, sex, financial means, and age, respectively.[8] In truth, the only major restriction on voting rights that survives today is the disenfranchisement of criminal offenders.[9]

Almost every state now disenfranchises felons in some way — only Maine and Vermont do not.[10] Three states permanently bar felons from the voting booths, ten disenfranchise felons temporarily, and thirty-six automatically reinstate a felon's right to vote upon that individual's completion of his or her prison sentence, parole or probation period.[11] Based on these facts, it is clear that the rescission of felons' right to vote has some impact on every election, during every election cycle, nationwide. Most notably, the presidential election of 2000 stirred the felon disenfranchisement debate.[12] High minority crime rates have led to racially disproportionate ratios of

3. R. Gregory Jerald, *Modern Day Discrimination or a Valid Exercise of States' Rights?: The Circuits Split as to Whether the Federal Voting Rights Act Applies to State Felon Disenfranchisement Statutes*, 7 FLA. COASTAL L. REV. 141, 145 (2005).

4. James A. Gardner, *The Dignity of Voters – A Dissent*, 64 U. MIAMI L. REV. 435, 437 (2010) (citing Common Clause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009)).

5. Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535, 578 (2010) (citing Baker v. Carr, 369 U.S. 186, 242 (1962) (Douglas, J., concurring)).

6. Brooks, *supra* note 2, at 852-53 (citations omitted).

7. *Id.* (citing Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 160 (2001)).

8. *See* U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV, § 1, U.S. CONST. amend. XXVI, § 1.

9. Alec C. Ewald, *'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045.

10. Brooks, *supra* note 2, at 872.

11. THE SENTENCING PROJECT, *Felony Disenfranchisement Laws in the United States* 1 (Mar. 10, 2010), at http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf.

12. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 690 (2006).

disenfranchised felons.[13] Approximately 1.4 million black Americans, or thirteen percent of black men, are disenfranchised from voting.[14] With such a large percentage of potential minority voters banned from registering their opinions in elections, and the fact that a large percentage of minority voters support Democratic candidates in local and national elections,[15] the effect of felon disenfranchisement on the elective process is staggering.[16] From many people's perspective, "[i]t is not an exaggeration to say that the disenfranchisement of ex-felons gave [Florida] and [the] election to George W. Bush and changed the course of American and world history."[17]

Although the practice of disenfranchising felons was widely accepted until shortly after the 2000 election, it has been challenged frequently in the last ten years,[18] with multiple lawsuits filed to overturn state felon disenfranchisement laws.[19] This article addresses the controversy through the most recent trend in felon disenfranchisement litigation: challenging felony voter disqualifications through the Voting Rights Act of 1965.[20]

In the next section, this article examines the historical practice of felon disenfranchisement, tracing the practice from inception to today.[21] Part III reviews the legal landscape of felon disenfranchisement, including the major constitutional and statutory considerations. The Fourteenth Amendment specifically addresses felon disenfranchisement;[22] and the Voting Rights Act contains a nondiscrimination provision that has surfaced as a recent ground for

13. Brooks, *supra* note 2, at 873.

14. *Id.*

15. Elizabeth M. Ryan, Note, *Causation or Correlation?: The Impact of LULAC v. Clements on Section 2 Lawsuits in the Fifth Circuit*, 107 MICH. L. REV. 675, 694 (2009) (citing League of United Latin American Citizens v. Clements, 999 F.2d 831, 877, 891–93 (5th Cir. 1993) (en banc)).

16. Cormac Behan & Ian O'Donnell, *Prisoners, Politics and the Polls*, 48 BRIT. J. CRIMINOLOGY 319, 322 (2008) (citing C. Uggen, J. Manza, and M. Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, *in* 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281–310 (2006).

17. *Id.*

18. Caroline A. Newman, Note, *Constitutional Problems with Challenging State Felon Disenfranchisement Laws Under the Voting Rights Act of 1965*, 38 CONN. L. REV. 525, 527–29 (2006) (citations omitted).

19. *See, e.g.*, Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006); Johnson v. Governor, 405 F.3d 1214 (11th Cir. 2005).

20. 42 U.S.C. § 1973 (1965 & Supp. 1982).

21. *See infra* Part I.

22. U.S. Const. amend XIV, § 1. For a discussion of the Fourteenth Amendment as it applies to felon disenfranchisement, *see infra* Part III.A.

challenging the disenfranchisement of felons in the court system.[23] The article considers the relevant case law from various federal appellate courts, including *Richardson v. Ramirez*[24] and *Hunter v. Underwood*[25] — the two Supreme Court decisions that address felon disenfranchisement. Next, the focus shifts to two United States Court of Appeals decisions: *Johnson v. Governor*[26] and *Hayden v. Pataki*,[27] both of which hold that the nondiscrimination provisions of the Voting Rights Act do not apply to felon disenfranchisement laws. Part II concludes by addressing *Farrakhan v. Washington*[28] and *Farrakhan v. Gregoire*,[29] which applied two different types of analysis to the issue.[30]

Because the potential Circuit split makes the question ripe for Supreme Court review, Part III asks whether Section Two of the Voting Rights Act invalidates felon disenfranchisement provisions as racially discriminatory. In answering the question, this article analyzes the Voting Rights Act and suggests that because the plain meaning of the statute is clear and unambiguous, the Voting Rights Act is applicable to felon disenfranchisement.

Turning to the text of the statute itself, this article will demonstrate that felon disenfranchisement results in the denial of the right of citizens to vote on account of race. Because the Supreme Court has never considered or developed a test for vote denial claims under the Voting Rights Act, this article proposes a test based on the Court's treatment of vote dilution claims. Under this new test and its three principle concepts of power, cohesion, and submergence, this article argues for an end to felon disenfranchisement because it

23.42 U.S.C. § 1973 (1965 & Supp. 1982). For a discussion of the Voting Rights Act as it applies to felon disenfranchisement, *see infra* Part III.A.

24. Richardson v. Ramirez, 418 U.S. 24 (1974). *Richardson v. Ramirez* is discussed *infra* at Part II.A.

25. Hunter v. Underwood, 471 U.S. 222 (1985).

26. Johnson v. Governor, 405 F.3d 1214 (11th Cir. 2005). *Johnson v. Governor* is discussed *infra* at Part II.C.1.

27. Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006). *Hayden v. Pataki* is discussed *infra* at Part II.C.2.

28. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) [hereinafter *Farrakhan I*] *Farrakhan I* is discussed *infra* at Part II.C.3.a.

29. Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010) [hereinafter *Farrakhan II*] *Farrakhan II* is discussed *infra* at Part II.C.3.b.

30. The Circuit split created by the *Farrakhan* cases has been complicated by a recent en banc, per curiam holding of the United States Court of Appeals for the Ninth Circuit. On October 7, 2010, the court modified its prior decisions to require plaintiffs seeking to overturn felon disenfranchisement laws due to racial disparity in the criminal justice system to prove intentional discrimination either in the enacting of the felon disenfranchisement provision or in the criminal justice system as a whole. Despite this ruling, the court did not modify its decision that Section Two of the Voting Rights Act applies to felon disenfranchisement. *See generally* Farrakhan v. Washington, 623 F.3d 990 (9th Cir, 2010) [hereinafter *Farrakhan III*].

results in racial discrimination in violation of the Voting Rights Act.

I. Historical Background

Consistently throughout history, Western civilizations excluded convicted criminals from voting in representative elections.[31] Ancient Greek and Roman cultures barred felons from voting in what are generally considered the first instances of the practice.[32] In Greece, criminals were placed in "infamy," a type of punishment which prevented them from voting, attending assemblies, making public speeches, or holding political office.[33] A similar penalty was imposed in ancient Rome for crimes involving "moral turpitude."[34] In Medieval and Renaissance Europe, "civil death" and "attainder" laws required criminals to forfeit family and political rights.[35] In nineteenth century Europe, felons were not allowed to vote or to hold public office.[36] The United States inherited its disenfranchisement laws from the English.[37] Eleven of the thirteen original colonies adopted felon disenfranchisement provisions in their individual constitutions before 1821.[38] By the time the Fourteenth Amendment was adopted in 1868, twenty-nine states disenfranchised felons.[39]

Criminal voting restrictions originated from a desire to prevent those individuals who have shown a history of poor decision-making from electing the officials who govern the community.[40] These laws have continued over time, based on the presumption that criminal offenders should not participate actively in the administration of a society, by the rules of which he or she refuses to abide.[41] As one

31. Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 331 (2007) (citing Alec C. Ewald, *'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–66 (2002)).

32. Ewald, *supra* note 8, at 1045.

33. *Hayden*, 449 F.3d at 316 (quoting Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and their Removal: A Comparative Study*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 347, 351 (1968)).

34. *Id.* (citing Damaska, *supra* note 33, at 351).

35. *Id. See also* Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 765 (2005).

36. *Hayden*, 449 F.3d at 316 (citing Damaska, *supra* note 33, at 352-53). *See also* Nunn, *supra* note 35, at 765.

37. Nunn, *supra* note 35, at 765.

38. *Hayden*, 449 F.3d at 316–17 (quoting Green v. Bd. of Elections, 380 F.2d 445, 450 (2nd Cir. 1967) (citations omitted)).

39. *Id.*

40. Nunn, *supra* note 35, at 766.

41. Clegg, *supra* note 7, at 172.

author put it: "[W]e do not want people voting who are not trustworthy and loyal to our republic. . . . It is not unreasonable to suppose that those who have committed serious crimes may lack this trustworthiness and loyalty."[42] Courts which have examined the issue have gone a step further: Law-abiding citizens may prohibit criminal offenders from electing the legislators, executives, prosecutors and judges who draft and enforce the laws of the community.[43] While this reasoning may seem logical, the automatic disenfranchisement of felons leads to some questionable circumstances. Even today such crimes as disorderly conduct, breaking a water pipe, aiding or abetting another to gamble, and aiding or encouraging animal fights, can cause a person to be stripped of the right to vote.[44]

Still today, felon disenfranchisement remains the norm in the United States. As a result of various re-enfranchisement campaigns, however, many of the forty-eight states, plus the District of Columbia, which currently disenfranchise felons have relaxed their voting restrictions slightly.[45] Public support for re-enfranchisement has also increased: A 2002 study showed that the public supports re-enfranchisement by wide percentages for felons, probationers, parolees, and to an extent, even for violent offenders.[46] Combined with the legislative trend of "softening" felon disenfranchisement, these numbers show support for a restructuring of felon disenfranchisement in this country.

As is often the case when public support for a position changes over time and begins to contrast with the history of practice, various lawsuits are filed to determine what is right. However, in the cases that have arisen out of the conflict between public opinion and historical practice, the real question is whether felons have a legal framework with which to challenge their disenfranchisement.[47]

II. Relevant Law

The first challenges to state felon disenfranchisement statutes were based on the Due Process and Equal Protection Clauses of the

42. *Id.*

43. *Simmons*, 575 F.3d at 33 (quoting Green v. Bd. of Elections, 380 F.2d 445, 451 (2nd Cir. 1967)).

44. Gottlieb, *supra* note 2, at 1940 (internal quotation marks and citations omitted).

45. *Id.* at 1943.

46. Jeff Manza, et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 283 (2004).

47. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974); Farrakhan II, 590 F.3d 989 (9th Cir. 2010); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006); Johnson v. Governor, 405 F.3d 1214 (11th Cir. 2005).

Fourteenth Amendment.[48] *Richardson v. Ramirez*,[49] citing language in the Amendment regarding states' authority to deny criminals the right to vote,[50] iterated a tacit approval of felon disenfranchisement laws in the United States.[51] *Hunter v. Underwood* later held that the Amendment's support of felon disenfranchisement was limited and could not be used to purposefully discriminate against racial minorities.[52] Following the ratification of the Voting Rights Act which, in part, outlaws discriminatory voting restrictions,[53] felon disenfranchisement was frequently challenged as an impermissible voting restriction,[54] but often the result was no different. In *Johnson v. Governor*,[55] and *Hayden v. Pataki*[56] federal courts held that felons cannot attack disenfranchisement laws through Section Two of the Voting Rights Act.[57] In 2010, however, in a departure from what was considered well-settled law on that subject, *Farrakhan v. Gregoire* (*Farrakhan II*)[58] overturned the State of Washington's felon disenfranchisement laws under the Voting Rights Act,[59] creating, what was perceived at the time, as a circuit split. While the United States Court of Appeals for the Ninth Circuit would later state that its opinion in *Farrakhan II* "sweeps too broadly[,]" it still left intact its finding that the Voting Rights Act applies to felon disenfranchisement.[60] The Supreme Court has yet to consider felon

48. *See Richardson*, 418 U.S. 24, and *Hunter*, 471 U.S. 222.

49. *See Richardson*, 418 U.S. 24.

50. The relevant text of the Amendment states that '[r]epresentatives shall be apportioned among the . . . States according to their respective numbers, [b]ut when the right to vote at any election . . . is denied to any of the . . . inhabitants of such State, . . . or [are] in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in . . . proportion.' U.S. CONST. amend XIV §§ 1–2.

51. *See generally* Farrakhan II, 590 F.3d 989 (9th Cir. 2010); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006); Johnson v. Governor, 405 F.3d 1214 (11th Cir. 2005) (each citing *Richardson v. Ramirez* for its holding that, without more, felon disenfranchisement is not a violation of Fourteenth Amendment equal protection).

52. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

53. 42 U.S.C. § 1973 (1965 & Supp. 1982).

54. *See Farrakhan II*, 590 F.3d 989; *Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

55. *Johnson*, 405 F.3d 1214.

56. *Hayden*, 449 F.3d 305.

57. *See generally Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

58. *Farrakhan II*, 590 F.3d 989 (9th Cir. 2010). *Farrakhan II* actually began as *Farrakhan v. Farrakhan I*, 338 F.3d 1009 (9th Cir. 2003), which first reached the United States Court of Appeals for the Ninth Circuit in 2003. The Court in *Farrakhan I* was actually the first decision of a federal appellate court which took up the question to find that the Voting Rights Act applies to felon disenfranchisement laws. The Court remanded the case back to the district court. Eventually the case returned to the United States Court of Appeals for the Ninth Circuit as *Farrakhan II*.

59. *See generally Farrakhan II*, 590 F.3d 989.

60. *Farrakhan III*.

disenfranchisement under Section Two of the Voting Rights Act, but its decision in *Thornburg v. Gingles*,[61] which outlines a test for racial discrimination in vote dilution claims, may be instructive in creating a framework by which to reach felon disenfranchisement.

A. *Richardson v. Ramirez*

In *Richardson v. Ramirez*, ex-felons challenged a California law that denied people convicted of "infamous crimes" the right to vote.[62] The representative plaintiffs alleged that the law, and various election rules used to disenfranchise felons, violated the Equal Protection Clause of the Fourteenth Amendment.[63] They further argued that the government must prove a compelling state interest was served by the disenfranchisement of a class of potential voters, and that California was unable to do so with respect to felons.[64] The United States Supreme Court disagreed, holding that the language of the amendment affirmatively permitted the disenfranchisement of felons, therefore no equal protection challenge could survive.[65] In a majority opinion, the court noted that, while a typical Fourteenth Amendment challenge focuses on section one of that amendment, felon disenfranchisement also calls for a Section Two analysis.[66] The state argued that the Equal Protection Clause of the Fourteenth Amendment could not be used to strike down felon disenfranchisement when the text of the amendment explicitly permits the practice.[67] After a thorough analysis of the legislative history behind the amendment, the Court agreed with the state, holding that Congress intended to disenfranchise felons at the time the amendment was written.[68] The Court also found that the state is not required to show a compelling state interest as a basis for felon disenfranchisement.[69] Under the Court's analysis, Section One of the amendment could not be used to bar a practice expressly permitted by Section Two;[70] therefore, felon disenfranchisement was, at least on its face, constitutional. Equal Protection challenges to felon disenfranchisement are not completely infertile ground, however, as

61. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

62. *Richardson*, 418 U.S. at 26–27.

63. *Id.* at 33.

64. *Id.*

65. *Id.* at 54–55.

66. *Id.* at 41–43. Section One of the Fourteenth Amendment contains both the equal protection and due process clauses, while Section Two refers only to manner in which votes are apportioned in representative elections. *See* U.S. CONST. amend. XIV.

67. *Richardson*, 418 U.S. at 43.

68. *Id.* at 43–53.

69. *Id.* at 54–55.

70. *Id.* at 55.

revealed by the Court's decision in *Hunter v. Underwood*.[71]

B. *Hunter v. Underwood*

In 1901, the Alabama Constitution was amended to disenfranchise from voting those convicted of crimes involving moral turpitude.[72] In *Hunter v. Underwood*, plaintiffs filed suit seeking a declaration that the constitutional provision was invalid as to individuals convicted of crimes not punishable by a prison sentence because the law was created on a racially discriminatory basis and has had such an impact.[73] The case became the first — and, to date, only — time the Supreme Court ruled a felon disenfranchisement provision unconstitutional, as the Court found that an impermissible racially discriminatory purpose fueled the amendment.[74]

The Court began its review by noting that Alabama's felon disenfranchisement statute was race-neutral on its face.[75] Under an equal protection analysis, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[76] For this case the Court applied a two-part test to determine whether the Alabama felon disenfranchisement law violated the Equal Protection Clause.[77] First, a court determines whether racial discrimination was "a substantial or motivating factor" in the legislature's choice to disenfranchise felons.[78] If so, the burden then shifts to the state to prove that the provision "would have been enacted in the absence of any racially discriminatory motive.[79]

Under the two-part test, the Court noted the trial testimony of various historians who stated that Alabama's Constitutional Convention, in which the felon disenfranchisement provision was enacted, was drafted with the intent to disenfranchise blacks.[80] The delegates at an all-white convention purposefully sought to establish

71. Hunter v. Underwood, 471 U.S. 222, 233 (1985).
72. *Id.* at 223.
73. *Id.* at 224.
74. *Id.* at 232–33.
75. *Id.* at 227.
76. *Id.* at 227–28 (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264–65 (1977)).
77. *Id.* at 228.
78. *Id.*
79. *Id.*
80. *Id.* at 228–31.

white supremacy in the state.[81] The Court held that the rampant racial animus behind the enactment of the amendment constituted the racially discriminatory intent sufficient to render the provision unconstitutional.[82] The Court found this evidence so compelling that it concluded that it was proof the provision would not have been enacted absent the racially discriminatory motive.[83] The Court's ruling made it clear that the bar to reach an equal protection violation in felon disenfranchisement cases is very high because of the difficulty inherent in determining the motivation behind official action.[84] As a result, subsequent plaintiffs were forced to seek additional, alternative avenues to attack felon disenfranchisement.

C. Voting Rights Act

Recent challenges to state felon disenfranchisement laws have focused on the Voting Rights Act, which prohibits discrimination in voter qualifications.[85] The Voting Rights Act was originally enacted in 1965 in an effort to outlaw racially discriminatory voting practices in Southern states.[86] The statute was amended in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden*.[87] Contrary to Congress's original intent, *Bolden* required plaintiffs to satisfy an exceedingly high burden to prove a discriminatory purpose.[88] Congress responded by redrafting the statute to implement a results-based test to determine whether a voting restriction is lawful.[89] Under the amended version, a statute violates the Voting Rights Act if it "results in the denial of the right to vote on account of race."[90] Starting with the 2005 case *Johnson v. Governor*, the reduced burden on potential plaintiffs in felon disenfranchisement cases produced an increase in litigation challenging the practice in various states.[91]

1. Johnson v. Governor

81. *Id.* at 229.

82. *Id.* at 233.

83. *Id.* at 231.

84. *Id.* at 228 (citing Rogers v. Lodge, 458 U.S. 613 (1982)).

85. 42 U.S.C. § 1973 (1982).

86. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (discussing the purposes of the Voting Rights Act as a measure intended to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

87. City of Mobile v. Bolden, 446 U.S. 55 (1980).

88. *Hayden*, 449 F.3d at 313 (citing *City of Mobile v. Bolden*, 446 U.S. at 62).

89. *Id.*

90. *Id.* (internal quotations omitted). *See also* 42 U.S.C. § 1973 (1982).

91. *Johnson*, 405 F.3d 1214.

The plaintiffs, felons who had completed their prison sentences, filed suit seeking to overturn Florida's felon disenfranchisement statute under both the Equal Protection Clause and Section Two of the Voting Rights Act.[92] Using the Supreme Court directive in *Richardson v. Ramirez*,[93] the United States Court of Appeals for the Eleventh Circuit found no equal protection violation on the petitioners' Fourteenth Amendment claim because they concluded that there was no indication in Florida's legislative history that racial animus prompted the enactment of the disenfranchisement provision.[94]

The plaintiffs' Voting Rights Act challenge proved to be a much less clear-cut analysis for the court.[95] Because Section Two only applies to vote denial and vote dilution, it does not prohibit all voting restrictions that may disproportionately affect minorities.[96] The court had to decide whether the Voting Rights Act applied to felon disenfranchisement at all.[97] On this issue, the court determined that Section Two does not apply to felon disenfranchisement laws, stating that such an argument placed the Voting Rights Act in conflict with the Fourteenth Amendment.[98] The court stated that Section Two could only apply to felon disenfranchisement if there was a "clear statement of Congress endorsing [that] understanding" and that without "a record of constitutional violations, applying Section Two of the Voting Rights Act to Florida's felon disenfranchisement law would force us to address whether Congress exceeded its enforcement powers under the Fourteenth and Fifteenth Amendments."[99] In Johnson, the court found neither a clear statement of Congress nor a history of constitutional violations in

92. In 2004, Florida law barred all citizens convicted of felonies from voting unless and until authorities restored their civil rights through clemency. *Johnson v. Governor*, 405 F.3d 1214, 1216 (2005) (quoting FLA. CONST. art. VI § 4 (1968)).

93. *Richardson*, 418 U.S. 24.

94. *Johnson*, 405 F.3d at 1223–27.

95. *Id.* at 1227–34.

96. *Id.* at 1228.

97. *Id.* at 1227. At the time *Johnson* reached the Court of Appeals for the Eleventh Circuit, various courts or judges had landed on opposite sides of the issue. In *Muntaqim v. Coombe*, 366 F. 3d 102, 124 (2nd Cir. 2004), the Second Circuit Court of Appeals held that "Section 2 [of the Voting Rights Act] did not reach New York's felon disenfranchisement statute[.]" A similar analysis was reached by Judge Kozinski in his dissenting opinion in *Farrakhan II*, 359 F.3d 1116 (9th Cir. 2004). On the other hand, the majority in a prior review of *Farrakhan* found that "Section 2 applied to Washington's felon disenfranchisement law[,]" *see Farrakhan I*, 338 F.3d 1009, 1014–15 (9th Cir. 2003), and the Court of Appeals for the Sixth Circuit "assumed" that Section Two of the Voting Rights Act applies to felon disenfranchisement, *see Wesley v. Collins*, 791 F.2d 1255, 1259–61 (6th Cir. 1986).

98. *Johnson*, 405 F.3d at 1228–34.

99. *Id.* at 1229–31.

Florida's statute.[100]

2. Hayden v. Pataki

In *Hayden v. Pataki*, minority felons challenged New York's felon disenfranchisement statute under the Voting Rights Act.[101] Using a similar reasoning as the court in *Johnson v. Governor*,[102] and through an extensive statutory analysis, the court held that Section Two of the Voting Rights Act does not apply to felon disenfranchisement.[103]

In conducting its analysis, the court first looked to the plain meaning of the statutory text, noting that unambiguous statutes are construed in accordance with their plain language.[104] Although the statute is broadly worded, the court was unconvinced of its ambiguity and noted that "there are persuasive reasons to believe that Congress did not intend to include felon disenfranchisement provisions within the coverage of the Voting Rights Act . . ."[105] Using a totality of the circumstances test,[106] and the Fourteenth Amendment's "explicit approval" of disenfranchisement, the court held that absent intentional discrimination by the legislature, New York's felon disenfranchisement statute would pass an Equal Protection challenge.[107] The court cited additional support for its position from evidence of the widespread historical practice of disenfranchisement in Western civilization and the states' near unanimous disenfranchisement of at least some groups of felons.[108] The court also considered the congressional record of the Voting Rights Act, including floor debates and subsequent legislative action as additional persuasive authority on the issue.[109] The court's analysis was so comprehensive that other appellate courts adopted it as a model for analyzing disenfranchisement statutes in their own jurisdictions.[110] Only one circuit disagreed with the *Hayden* analysis.[111]

100. *Id.* at 1232.

101. *Hayden*, 449 F.3d 305, 310.

102. *Johnson*, 405 F.3d 1214, 1233–34.

103. *Hayden*, 449 F.3d at 323.

104. *Id.* at 314–15.

105. *Id.* at 315.

106. *Id.* at 321.

107. *Id.* at 316 n.11.

108. *Id.* at 316.

109. *Id.* at 317–23.

110. *See* Simmons v. Galvin, 575 F.3d 24, 31 (2009). In *Simmons v. Galvin*, the First Circuit implemented an almost identical analysis and holding in finding the Massachusetts felon disenfranchisement statute valid. *Id.*

111. *See Farrakhan I*, 338 F.3d 1009; *Farrakhan II*, 590 F.3d at 993.

3. The Farrakhan Cases

In 1996, a group of Washington minority felons challenged the state's felon disenfranchisement statute under Section Two of the Voting Rights Act.[112] In *Farrakhan v. Washington* (*Farrakhan I*),[113] the district court granted summary judgment in favor of the state, holding that any racial disparity in voting was not causally related to felon disenfranchisement in Washington.[114] The United States Court of Appeals reversed and remanded the case back to the district court.[115] On remand, the district court again granted summary judgment in the state's favor on the ground that plaintiff's evidence, although compelling, was insufficient to prove that felon disenfranchisement denied felons the right to vote on account of race.[116] The plaintiffs appealed again, and the Court of Appeals held that felon disenfranchisement practices in Washington violated Section Two of the Voting Rights Act.[117]

a. Farrakhan I

In 1996, Washington's felon disenfranchisement statute barred from voting individuals convicted of crimes punishable by death or incarceration.[118] The plaintiffs' suit alleged violations of both the United States Constitution and the Voting Rights Act, but it was the plaintiffs' vote denial claim that shaped the district and appellate courts' analyses.[119] Unlike other circuits considering the issue, "[i]n allowing Plaintiffs to proceed on their vote denial claim[,] the district court rejected the State's argument that [the Voting Rights Act] could not apply to felon disenfranchisement laws."[120] This holding allowed the court to consider the merits of the plaintiffs' factual claims, but the court held that the facts were not sufficient to prove that felon disenfranchisement caused racial disparity in Washington's voting system.[121]

In defense of the statute, the state cited the historical acceptance of felon disenfranchisement and argued that Washington had taken

112. *Farrakhan I*, 338 F.3d 1009.
113. *Id.*
114. *Farrakhan I*, 338 F.3d at 1014.
115. *Id.*
116. *Farrakhan II*, 590 F.3d at 995.
117. *Id.* at 1016.
118. *Farrakhan I*, 338 F.3d at 1012 n.1.
119. *Id.* at 1012–13.
120. *Id.* at 1012.
121. *Id.* at 1014.

specific steps to eliminate racial disparities in its voting practices and its criminal justice system.[122] In contrast, the plaintiffs relied primarily on statistical evidence and expert testimony showing racial disparities in Washington's arrest, bail, pretrial release, charging, and sentencing practices.[123] In addition, the plaintiffs attempted to "show the extent to which these disparities could be attributed to racial bias and discrimination."[124] Finally, the plaintiffs drew similarities between the Washington disenfranchisement statute and those of other states in which they alleged a discriminatory intent backed the enactment of the law.[125] The district court held that, despite its compelling nature, the plaintiffs' evidence was insufficient to prove a causal connection between the felon disenfranchisement statute and the disproportionate impact on racial minorities' voting rights.[126] On appeal, the Ninth Circuit affirmed the district court's threshold decision that Section Two of the Voting Rights Act applies to any voting qualification, including felon disenfranchisement.[127] However, the court reversed because the district court misapplied the Voting Rights Act totality of the circumstances test, "which requires the court to consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process."[128] Integral to the court's analysis was the Senate Report drafted alongside the 1982 amendments to the Voting Rights Act, which set forth nine factors ("the Senate Factors") relevant to a Section Two analysis, and particularly Senate Factor five.[129] Senate

122. *Id.* at 1013.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1014.

127. *Id.* at 1016. At the time *Farrakhan I* reached the United States Court of Appeals for the Ninth Circuit, no other federal appellate court had considered whether the Voting Rights Act applied to felon disenfranchisement laws; therefore the issue was one of first impression for the court. *See generally id.*

128. *Farrakhan I*, 338 F.3d at 1014.

129. *Id.* at 1015 (citing S. Rep. No. 97-417, at 28–29 (1982), *reprinted* in 1982 U.S.C.C.A.N. 177, 206–07). The nine factors cited in the Senate Report are: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which

Factor five focused on "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process[.]"[130] The court stated that Senate Factor five allows courts to identify voting requirements that result in a shifting of racial inequality from society at large into the political process.[131] The court concluded that racial bias in the criminal justice system hindered blacks' ability to participate in politics and elections, and therefore was relevant to an analysis of the Senate Factors.[132] The court remanded the case with instructions that the district court consider the totality of the circumstances, "including the petitioners' evidence of racial bias in the criminal justice system,"[133] as specified in Senate Factor five.

b. Farrakhan II

On remand, the parties filed new cross-motions for summary judgment.[134] The petitioners relied generally on the same evidence presented previously, but focused on two expert reports which concluded that racial disparities in Washington's criminal justice system could not be explained by legitimate or race neutral factors.[135] The experts also reported that "blacks and Latinos are overrepresented, and whites underrepresented, among Seattle's drug arrestees[,]" one cause of that being law enforcement officials' focus on certain drugs and high-drug-use areas, when such focus is "not explicable in race neutral terms."[136]

The district court had been compelled by the plaintiffs' evidence to state that "there is discrimination in Washington's criminal justice system on account of race . . . [which] clearly hinder[s] the ability of racial minorities to participate effectively in the political process . . .'"[137] After conducting an analysis for the other Senate Factors, however, the court explained that the petitioners' evidence

members of the minority group have been elected to public office in the jurisdiction; additional factors include: (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Id.*

130. *Farrakhan I*, 338 F.3d at 1015.

131. *Id.* at 1020.

132. *Id.*

133. *Id.*

134. *Farrakhan II*, 590 F.3d at 994.

135. *Id.* at 994–95.

136. *Id.* at 995.

137. *Id.*

was only one factor of many to consider; that the other factors weighed heavily in favor of the state; so that the totality of the circumstances fell in the state's favor.[138]

The landscape of felon disenfranchisement law had changed drastically by the time the case again reached the Ninth Circuit Court of Appeals. Appellants argued that the sister-circuit decisions in *Johnson*[139] and *Hayden*[140] required the court to consider whether Section Two of the Voting Rights Act applied to felon disenfranchisement.[141] The court had originally found that vote denial claims challenging felon disenfranchisement laws were cognizable under Section Two, and the court noted that its decision in *Farrakhan I* was still the law of the circuit and found no need to modify that ruling.[142] Turning to the cross-motions for summary

138. *Id.*

139. *Johnson*, 405 F.3d 1214.

140. *Hayden*, 449 F.3d 305.

141. *Farrakhan II*, 590 F.3d at 999.

142. *Farrakhan II*, 590 F.3d at 999 citing *Farrakhan I*, 338 F.3d at 1016. The state's argument required the litigation of a tangential question: whether an exception to the law of the case doctrine, which states that "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case[,]" exists in *Farrakhan II*, 590 F.3d 989 (9th Cir. 2010), such that the *Farrakhan I*, 338 F.3d 1009 (9th Cir. 2003), holding should be abandoned and the State's argument upheld. *Farrakhan II*, 590 F.3d at 999-1000. The law of the case doctrine presently has only three exceptions. *Id.* "A panel of [the] court has discretion to depart from the law of the case . . . where: '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.'" *Id.* (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000) (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997))).
The state requested that the court abandon its prior ruling under either or both of the first two exceptions. *Id.* Citing *Johnson*, 405 F.3d 1214 (11th Cir. 2005), and *Hayden*, 449 F.3d 305 (2nd Cir. 2006), the state argued that "[t]he subsequent intervening authority of sister circuits reveals that this Court's conclusion was clearly erroneous and works a manifest injustice." *Farrakhan II*, 590 F.3d at 999. The court, however, quickly dismissed that argument by stating that "[t]o the extent Defendants suggest that these cases constitute 'intervening controlling authority' that would make reconsideration appropriate, such argument is clearly incorrect. *Id.* at 999–1000. Out-of-circuit cases are not binding and therefore do not constitute 'controlling authority.'" *Id.* at 1000.
In further support of its decision, the court stated that it was not convinced that the *Johnson* and *Hayden* cases, *supra*, show that *Farrakhan I* was clearly erroneous. *Id.* at 1000. The court noted that both *Johnson* and *Hayden* "were rendered over vigorous dissents." *Id.* Moreover, *Farrakhan I* "was called en banc but failed to attract a majority vote of the non-recused active judges in favor of en banc rehearing." *Id.* Because the opportunity for further appellate review was sought and subsequently denied, it cannot be said that the decision was clearly erroneous, because the issue seemed well decided to the members of the bench at the time. The court also pointed to an off-point sister circuit case for support: In *Wesley v. Collins*, 791 F.2d 1255, 1259–62 (6th Cir. 1986), the Court of Appeals for the Sixth Circuit treated "felon disenfranchisement laws [as] cognizable under [Section Two of the Voting Rights Act]" despite not "directly address[ing] the question." *Id.* The court thus recognized a "close split among the circuits" on the issue, lending additional persuasive evidence that its decision in *Farrakhan I* was not clearly

judgment, the court acknowledged that defendants rested their entire appeal on the ground that "Plaintiffs' evidence of racial bias in Washington's criminal justice system 'is very limited,' and is inadequate to demonstrate that even Senate Factor 5 favors Plaintiffs' claims as a matter of law."[143] On the other hand, the plaintiffs pointed to the district court's fact-finding, which found evidence of racial disparity in Washington's criminal justice system to be compelling.[144] The plaintiffs argued that they should not have been required to produce evidence outside the scope of Senate Factor 5.[145] Although the plaintiffs presented no evidence of the other Senate Factors, the court held that "[s]ome Senate Factors may be relevant as circumstantial evidence with respect to certain vote denial claims, but proof of those Factors was not required where, under Factor 5, Plaintiff's provided strong, indeed 'compelling,' direct evidence of the alleged violation."[146] The court also stated that evidence drawn within one Senate Factor "may be enough in some instances"[147] to tip the totality of the circumstances in favor of the petitioners.

The court then determined that the evidence offered by the petitioners' proved that felon disenfranchisement vote denial in their case was based on racial discrimination.[148] As the Court stated in *Farrakhan I*, "the 'on account of' requirement may be met 'where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances,' which include the state's criminal justice system."[149] Citing to the lower court's fact-finding, the court determined that plaintiffs had met their burden of proof, and were entitled to summary judgment.[150]

c. Farrakhan III

The precedential nature of the *Farrakhan* cases would not last

erroneous. *Farrakhan II*, 590 F.3d at 1000.

143. *Farrakhan II*, 590 F.3d at 1002. Citing Supreme Court precedent, the Court noted that "Defendants' litigation strategy [was] a perilous one." *Id.* at 1003 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 161 (1970)). Having offered no "countering evidentiary material nor . . . affidavit [in support of its position]" the defendants left the Court only to decide whether the plaintiffs "ma[de] out a prima facie case that would entitle them to judgment as a matter of law if uncontroverted at trial." *Id.*

144. *Farrakhan II*, 590 F.3d at 1004.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1009.

149. *Farrakhan II*, 590 F.3d at 1009 (quoting *Farrakhan I*, 338 F.3d at 1019-20).

150. *Id.* at 1016.

long. In October 2010, in a per curiam opinion, the United States Court of Appeals for the Ninth Circuit revisited its prior holdings on felon disenfranchisement and added a wrinkle to the Voting Rights Act analysis.[151] In *Farrakhan III*, the court determined that the sister circuit decisions in *Johnson v. Governor*,[152] *Hayden v. Pataki*,[153] and *Simmons v. Galvin*,[154] as well as the long history of acceptance of felon disenfranchisement in this country, led the court to believe that its prior decisions "sweep[ ] too broadly."[155] Citing to *Hunter v. Underwood*[156] and *McCleskey v. Kemp*,[157] the court held that a plaintiff seeking to have felon disenfranchisement outlawed under Section Two of the Voting Rights Act based on racial disparity in the criminal justice system must prove that "the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent."[158] Because, in the *Farrakhan* cases, the plaintiffs failed to produce any evidence of intentional discrimination either in the criminal justice system or in the felon disenfranchisement law, the court affirmed the district court's grant of summary judgment in favor of the state.[159]

The decision in *Farrakhan III* is a curious one. While drafting a new rule designed specifically for plaintiffs challenging felon disenfranchisement on grounds that racial disparities exist in the criminal justice system, the court did not overturn its prior decisions on whether Section Two of the Voting Rights Act actually applied to felon disenfranchisement at all.[160] Accordingly, the circuit split on that issue remains alive today. While the United States Supreme Court has thus far declined to grant certiorari on the question of whether Section Two of the Voting Rights Act applies to felon disenfranchisement laws,[161] the landscape of the issue today provides compelling reasons for the nation's highest court to examine closely the situation of convicted felons currently suffering without suffrage.

III. Analysis

151. *Farrakhan III*, 623 F.3d 990 (2010).

152. *Johnson*, 405 F.3d at 1234.

153. *Hayden*, 449 F.3d at 323.

154. *Simmons*, 575 F.3d at 41.

155. *See generally, Farrakhan III* at 992–93.

156. *Hunter*, 471 U.S. at 233 (outlawing felon disenfranchisement provisions specifically enacted to intentionally discriminate against minorities).

157. McClesky v. Kemp, 481 U.S. 279, 297–98 (1987) (requiring a showing of intentional discrimination in the criminal justice system to show a violation of the Fourteenth Amendment).

158. *Farrakhan III*, 623 F.3d at 993–94.

159. *Id.*

160. *See generally, id.*

161. *See, e.g.*, Johnson v. Bush, 546 U.S. 1015 (2005) (the United States Supreme Court denied the plaintiffs' petition for certiorari in the *Johnson v. Governor* case).

Historically, the Fourteenth Amendment has proven to be an almost insurmountable barrier for felons to surpass to invalidate felon disenfranchisement provisions.[162] Because of the unfavorable language of the Amendment, which affirmatively permits the practice of felon disenfranchisement, potential plaintiffs must prove a discriminatory intent in the collective mind of the legislature in order to show that disenfranchisement practices are unconstitutional.[163] Of course, in most cases, legislators do not typically express their prejudices on the chamber floor, thus proving discriminatory intent can be a difficult task for a plaintiff to overcome. The Voting Rights Act, on the other hand, requires plaintiffs to meet a more manageable burden: that the voting restriction results in a discriminatory impact on a racial minority group. Asserting a claim under the Voting Rights Act, however, is also not without its barriers.

In order for a felon-plaintiff to mount a successful challenge to disenfranchisement laws under section two of the Voting Rights Act, he or she must meet two threshold requirements. First, a plaintiff must demonstrate that the applicable parameters of Section Two allow for a challenge to felon disenfranchisement.[164] As stated previously, three circuits have determined that the tacit approval of felon disenfranchisement in the Fourteenth Amendment, and the history of support for felon disenfranchisement in this country, dictate that Section Two does not apply.[165] One circuit has held the opposite: that Section Two controls all voting restrictions, including felon disenfranchisement.[166] Thus, the Voting Rights Act could be used to invalidate felon disenfranchisement statutes that result in the denial or abridgement of the right to vote on account of race.[167] In Part III.A., *infra*, this article argues that, based on a traditional statutory analysis, as prescribed by the United States Supreme Court, the plain meaning of the Voting Rights Act dictates that Section Two is applicable to all voting qualifications, including felon disenfranchisement.[168]

Once a plaintiff has proven that Section Two applies to felon disenfranchisement, he or she must show that the practice of disenfranchising felons results in a denial or abridgement of the right

162. *See infra* Part II.

163. *Id.*

164. *See, e.g.*, *Farrakhan II*; *Simmons*, F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

165. *See generally Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

166. *See generally Farrakhan II.*

167. *Id.*

168. *See infra* Part III.A.

of an individual or group to vote on account of race or color.[169] While the Supreme Court has created a test by which lower courts are to analyze vote *dilution* claims under the Voting Rights Act,[170] it has provided no recent direction on vote *denial* claims, and it has never considered vote denial under the Voting Rights Act. Because the concepts of vote denial (as applied to felon disenfranchisement) and vote dilution are inherently similar, in Part III.B, *infra*, this article calls for a reasonable modification of the Court's vote dilution test to be applied to vote denial cases.[171] Under the modified test, this article argues that felon disenfranchisement results in denying citizens the right to vote on account of race.[172]

A. The Voting Rights Act Applies to Felon Disenfranchisement

In considering whether the Voting Rights Act applies to felon disenfranchisement, it is necessary to engage in a statutory analysis of the law being challenged.[173] First, a court looks to the language of the statute.[174] If the text "has a plain and unambiguous meaning with regard to the particular dispute in the case" then all inquiries stop.[175] Only in exceptional circumstances should a court go beyond the plain meaning of an unambiguous statute.[176] While some courts may consider the legislative history of a particular statute, these courts do so "with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the plain meaning of the statutory language."[177] Illustrative of this concept is the Supreme Court's decision in *BedRoc Ltd., LLC v. United States*, where Justices Scalia and Kennedy joined a majority opinion in which the Court stated, in dicta, that to disregard the plain meaning of a statute would be a "radical abandonment of . . . longstanding precedent[ ]."[178]

Based on this well-established Supreme Court precedent, any analysis of Section Two of the Voting Rights Act must begin with a determination of whether the textual language is unambiguous.[179] If

169. 42 U.S.C. § 1973 (1982).

170. *See Thornburg*, 478 U.S. at 50–51; *see also infra* Section III.B.4.

171. *See infra* Part III.B.2.

172. *Id.*

173. *Hayden*, 449 F.3d at 314–15.

174. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

175. Robinson v. Shell Oil Co., 519 U.S. 337, 340–41 (1997) (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)).

176. *Id.* (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

177. Garcia v. United States, 469 U.S. 70, 75 (1984).

178. Bedroc Limited LLC. v. U.S., 541 U.S. 176, 187 n. 8 (2004).

179. *Barnhart*, 534 U.S. at 450.

so, the plain meaning of the law must be imposed, and only an "extraordinary showing of contrary intentions" by Congress would cause the Court to abandon that plain meaning.[180] The statutory text of the Voting Rights Act has never been analyzed by the Court for ambiguity. In the sections that follow, this article argues that Section Two of the Voting Rights Act is unambiguous, and application of its plain meaning dictates that it reaches all voting qualifications, including felon disenfranchisement.[181] Although it has been argued by various United States Courts of Appeal that the legislative history of the statute indicates that Congress intended for felon disenfranchisement to be excepted from review by Section Two,[182] those arguments do not provide an "extraordinary showing" of Congress's contrary intent.[183] Therefore, the plain meaning rule must not be abandoned and felon disenfranchisement must be analyzed under Section Two.[184]

1. The Voting Rights Act Is Unambiguous

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole."[185] Where it is reasonable to read a statute to have more than one acceptable meaning, the statute will be considered to be ambiguous.[186] Therefore, if the language and context of Section Two of the Voting Rights Act is susceptible to more than one reasonable meaning, it will be considered ambiguous, and the statutory analysis will require consideration of extrinsic factors.

Section Two of the Voting Rights Act outlaws voting restrictions, the imposition of which result in the loss of voting rights on account of one's race.[187] Various scholars and judges have opined

180. *Garcia*, 469 U.S. at 75.

181. *See infra* Part III.A.

182. *Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

183. *Cf. Garcia*, 469 U.S. at 75 (1984).

184. *See infra* Part III.A.

185. *Robinson*, 519 U.S. at 341 (citations omitted).

186.Condor Ins. v. Petroquest Resources, Inc., 601 F.3d 319, 321 (5th Cir. 2010) (quoting United States v. Valle, 538 F.3d 341, 345 (5th Cir. 2008)). *See also* Wisconsin v. Constantineau, 400 U.S. 433, 442 (1971) (stating that a statute was unambiguous because it was susceptible of only one reasonable meaning); Houghton v. Payne, 194 U.S. 88, 99 (1904) (stating that a statute is ambiguous where it is susceptible to two different meanings).

187. 42 U.S.C. § 1973 (1965 & Supp. 1982). Section Two, specifically, states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." *Id.*

that the statute seems clear and unambiguous,[188] but the Circuit Courts of Appeal have struggled with the issue and have not uniformly found such clarity.

2. *The Perceived Circuit Split Was Predicated on Incorrect Rulings from the First, Second, and Eleventh Circuits*

The First, Second, and Eleventh Circuit Courts of Appeal have each considered whether Section Two of the Voting Rights Act is ambiguous.[189] The First and Eleventh Circuits found ambiguity in the statute.[190] All three courts engaged in thorough extrinsic analyses to arrive at the conclusion that Section Two was inapplicable to felon disenfranchisement.[191] In *Johnson v. Governor*, the Eleventh Circuit stated that the statute's use of the terms "on account of race or color" renders the statute unclear as to its application to Florida's felon disenfranchisement law, the text of which is race neutral.[192] In *Simmons v. Galvin*, the First Circuit inexplicably stated that "it is neither plain nor clear that plaintiffs' claim fits within the text of [the statute]."[193] In *Hayden v. Pataki*, the Second Circuit was unwilling to state that Section two was ambiguous, but acknowledged that the

188. *See* Nixon v. Kent County, 76 F.3d 1381, 1386 (6th Cir. 1996) (noting that the language of Section Two is clear and unambiguous); *Hayden v. Pataki*, 449 F.3d 305, 367–68 (2nd Cir. 2006) (Sotomayor, J., dissenting) (stating that "[i]t is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].' And it is equally plain that [New York's statute] disqualifies a group of people from voting."); Bailey Figler, Note, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 774 (2006) (arguing that Section Two is clear and unambiguous); David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 439 n.227 (2006) (citing *Muntaqim v. Coombe*, 366 F.3d 102, 128 n.22 (2004), to argue that Section Two is unambiguous).

189. *Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

190. *Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

191. *Id.*

192. *Johnson*, 405 F.3d 1214, 1229 n.30. The court stated that Congress's decision to retain the phrase "on account of race or color" makes it unclear as to whether Section [two] would apply to Florida's felon disenfranchisement provision, which is endorsed by the Fourteenth Amendment, applies to felons without regard to race or color (it is particularly telling that over seventy percent of the plaintiffs' class is white), and is administered as one component of a felon's criminal sentence. . . . Moreover, the deep division among eminent judicial minds on this issue demonstrates that the text of Section [Two] is unclear. . . . Finally, the interpretation of the statute advanced by the dissenters would suggest that currently incarcerated felons may also fall within the scope of the statute. Unless one concedes that Section [Two] of the VRA reaches currently incarcerated felons, the interpretation advanced by the dissenters provides an additional reason why the statute is unclear. *Id.* (internal citations omitted).

193. *Simmons*, 575 F.3d at 35. Of course, the First Circuit's "agreement" with the Second Circuit is actually a misinterpretation of the Second Circuit's decision, which does not state that the statutory text is ambiguous. *See Hayden*, 449 F.3d at 315.

text was broadly worded.[194] It used this finding to justify abandoning the plain meaning of the statute.[195] While the split amongst the circuits on the potential ambiguity of Section Two might otherwise indicate that the statute is, in fact, ambiguous, the decisions of each of the First, Second, and Eleventh Circuits are flawed and must be discredited.

First, in *Johnson v. Governor*, the court held that Section Two was ambiguous because the court believed: (a) it was unclear whether the Florida statute is applicable to the Voting Rights Act; (b) it was unclear whether the Voting Rights Act applies to felons without regard to race or color; (c) judicial minds differ on the issue;[196] and (d) currently incarcerated felons may also be protected under the statute.[197] None of the reasons set forth by the *Johnson* court are valid under Supreme Court precedent, as they do not assert a reasonable alternative meaning to the text of the statute.[198] Instead, the court attempts to impugn ambiguity in the statute by stating that different holdings could result from a legal analysis if the facts of the underlying case are changed.[199] The court's reasoning is flawed, however, because it is not the end result of a legal analysis that determines whether the statute is ambiguous, but it is the language of the statute itself.[200] Engaging in a legal analysis of even the most unambiguous of statutes could result in different holdings; that is, in fact, a fundamental aspect of litigation — that different sets of facts, as applied to a single statute, control the end result.

Second, and as was stated previously, in *Hayden v. Pataki*, the court never ruled that Section Two was ambiguous.[201] In fact, although the court found the statute to be broad, it was unconvinced of Section Two's ambiguity.[202] Thus, the court's analysis of the history of felon disenfranchisement was impermissible under well-

194. *Hayden*, 449 F.3d at 315. In fact, four of the nine judges on the Court of Appeals, including current Supreme Court Justice Sonia Sotomayor, noted that the statute was unambiguous. Two others indicated that they were not convinced the statute was ambiguous, but engaged in a historical analysis anyway.

195. *Id.*

196. The court's argument that because judicial minds disagree on whether the statute is ambiguous, the statute must, in fact, be ambiguous, also must fail. In support of this assertion, the court stated that Muntaqim v. Coombe, 366 F.3d 102 (2nd Cir. 2004), a similar felon disenfranchisement case from the Circuit, ruled the statute ambiguous. On the contrary, that case states that Section Two does *not* appear to be ambiguous, *see Muntaqim* at 128 n.22, and the *Johnson* court fails to distinguish it, *see generally Johnson*, 405 F.3d 1214.

197. *Johnson*, 405 F.3d at 1229 n.30.

198. *See generally id.* at 1229–30.

199. *Id.* at 1229–30.

200. *Garcia*, 469 U.S. at 75.

201. *See generally Hayden*, 449 F.3d 305.

202. *Id.* at 315.

settled Supreme Court precedent.[203] Its decision should have been confined to an analysis of the facts as they apply to the statute, without considering extrinsic information.[204] The court's justification for stepping outside the plain statutory language is also weak, given that it cites to *Boston Sand & Gravel Co. v. United States*.[205] Although *Boston Sand & Gravel* states that the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists[,]"[206] it is an eighty-two-year-old outlier case that has been disregarded on countless occasions since.[207]

Finally, in *Simmons v. Galvin*, the court cites to *Hayden, supra*, to state that Section Two is ambiguous.[208] This is a glaring flaw in the court's analysis, given that *Hayden* did not actually stand for that position.[209] In addition, through a results-based framework, the First Circuit in *Simmons* concluded, just as the Eleventh Circuit did in *Johnson*[210], that Section Two is ambiguous.[211] In *Simmons* the court stated that Section Two was ambiguous since it is unclear whether Massachusetts's felon disenfranchisement statute is cognizable under Section Two because it disenfranchises felons, not because of race, but commission of a felony.[212] As this article argues in response to the *Johnson* case, *supra*, the proper determination of whether a statute is ambiguous turns on the language of the statute rather than the result after facts are applied.

A common theme runs through each of the courts' analyses of Section Two's potential ambiguity. In each case, the deciding court questioned whether the state law under review may be considered under Section Two.[213] In each case, the courts claim that the determination is unclear, which each court uses to find ambiguity in the statute.[214] None of the courts provide a reasonable alternative meaning of the statutory text, which is the test the Supreme Court would utilize in considering the issue.[215] Without a reasonable

203. *See Garcia*, 469 U.S. at 75 (1984) (calling for use of the plain meaning rule unless the statutory language is ambiguous).

204. *Id.*

205. *Hayden*, 449 F.3d at 347 (Parker, J., dissenting); Boston Sand and Gravel Co. v. United States, 278 U.S. 41 (1928).

206. *Boston Sand and Gravel Co.*, 278 U.S. at 48.

207. *Hayden*, 449 F.3d at 347 (Parker, J., dissenting).

208. *Simmons*, 575 F.3d at 35.

209. *See generally*, *Hayden*, 449 F.3d 305.

210. *Johnson*, 405 F.3d 1214.

211. *Simmons*, 575 F.3d at 35–36.

212. *Id.* at 33–35.

213. *See Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

214. *See Simmons*, 575 F.3d 24; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214.

215. *Id.*

argument as to the statute's ambiguity, the plain meaning of the statutory text is clear, and each court has overstepped the threshold concept of Section Two.

3. *The Plain Meaning of the Voting Rights Act Has Only One Reasonable Interpretation*

Disregarding the flawed analyses of the United States Courts of Appeal, Section Two of the Voting Rights Act is broad, but clear. The statement "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied[,]" very clearly implicates all voting qualifications or prerequisites. Congress's use of the terms "no voting qualification"[216] necessarily implies that, without exception, *all voting qualifications* are to be considered under Section Two, including those based on race, but also those based on any other qualifier, including moral character (which is the fundamental aspect of felon disenfranchisement) or no qualifier at all. The statute does not permit the court to question whether some qualifications should be exempt from the statutory analysis. Thus, any and all voting qualifications must be analyzed under the race-based protections of Section Two.

The statutory terms: "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," are equally clear.[217] This latter portion of the statutory provision provides the standard by which all voting qualifications are compared. If the voting qualification denies or abridges one's right to vote on account of race or color — i.e., if the statute disparately affects a minority group — the qualification is unlawful.[218] On the other hand, if the qualification does not impose at least a modicum of racial discrimination, the voting qualification is valid under Section Two. Despite the flawed decisions of the First, Second, and Eleventh Circuits, a review of the plain meaning of the statutory text of Section Two leads to one conclusion: Section Two of the Voting Rights Act is clear and unambiguous. Thus, under Supreme Court precedent, it is the plain meaning of the statute which controls the analysis,[219] and the plain meaning of the statute implies that Section Two of the Voting Rights Act applies to felon disenfranchisement. It is therefore not permissible to consider extrinsic information about the statute absent an "extraordinary

216. 42 U.S.C. § 1973 (1965 & Supp. 1982).

217. *Id.*

218. *Id.*

219. *See Garcia*, 469 U.S. at 75 (1984) (calling for use of the plain meaning rule unless the statutory language is ambiguous).

showing" by Congress that Section Two does not apply to felon disenfranchisement.[220] This is not to say that a constitutional conflict is not such an extraordinary basis, rather that Section Two can be read to specifically address situations in which felon disenfranchisement has become unconstitutional, not that it makes it so automatically.

4. The Legislative History of the Voting Rights Act Amendments Does Not Provide an Extraordinary Showing That Felon Disenfranchisement Was Excluded from the Reach of the Statute

It has long been believed that Congress says what it intends to say; thus, if Congress expressly intended for felon disenfranchisement to be excepted from Section Two of the Voting Rights Act, it would have so stated.[221] Nevertheless, some indication of legislative intent can be gleaned from the legislative history of the enactment of the statute.[222] In *Hayden v. Pataki*, the United States Court of Appeals for the Second Circuit examined the legislative history of the 1982 amendments to the Voting Rights Act in depth, and determined that Congress did not intend felon disenfranchisement to fall under Section Two.[223] However, because the *Hayden* court did not follow Supreme Court precedent and with it, the plain meaning of the statute, in that it did not consider whether the legislative history constituted an "extraordinary showing" by Congress that Section Two was inapplicable to felon disenfranchisement.[224]

In *Hayden*, the court began its legislative history analysis by noting that, at the time of the statute's enactment, the Voting Rights Act was intended to have the "broadest possible scope."[225] The law was designed to prevent development of new voting practices, predominantly in the pre-Reconstruction South, to exclude black

220. *Id.*

221. Supreme Court Justice Antonin Scalia states that "Congress expresses statutory meaning solely through enacted language." Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 587 (1994).

222. *See* Frank H. Easterbrook, *The Role of Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) (stating that when a court uses the legislative history to determine the intent of the legislators, it "greatly increases the discretion, and therefore the power, of the court"). "Congress is like Humpty Dumpty. . . . When Congress uses a word, the word means what Congress says it means," and that meaning is typically found in the legislative history and committee reports accompanying an enacted law. Spence, *supra* note 221, at 587 (quoting Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386 (1987)).

223. *Hayden*, 449 F.3d at 321–23.

224. *See generally id.*

225. *Id.* at 318 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

voters from the election process.[226] Although the statute did not specifically state that it was inapplicable to felon disenfranchisement, legislators integral to the drafting of the statute stated during floor debate that laws barring felon voting would not be challenged under the statute.[227] From this evidence, the court believed that it was Congress's intent to exclude felon disenfranchisement from the reach of the statute.[228] The court also cited subsequent congressional activity, including bills from 1972 and 1973 intended to specifically draw felon disenfranchisement within the boundaries of the statute, and Congress's 1974 enactment of a felon disenfranchisement statute for the District of Columbia,[229] to support its holding. The court believed these Congressional activities left "no doubt of the general understanding that the Voting Rights Act did not encompass felon disenfranchisement" at the time.[230]

In turning to the congressional record of the 1982 amendments, the court noted that Congress made no mention of an intention to apply the Voting Rights Act to felon disenfranchisement, and if it had intended for that to be the case, Congress would have so stated in the Senate Report.[231] Because the 1982 amendments were enacted in direct response to the Supreme Court's ruling in *City of Mobile v. Bolden*,[232] the court concluded that the only intent of enacting the amendments was to remedy what Congress saw as an incorrect ruling from the Supreme Court.[233] Based on this cumulative evidence, the court found Section two of the Voting Rights Act "to be one of the rare cases in which literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[234]

The court's analysis in *Hayden* comprised three categories: historical approval of felon disenfranchisement; bills enacted after the Voting Rights Act that approved of felon disenfranchisement; and a lack of consideration of the issue in the 1982 amendments.[235] However, none of these categories individually, nor the collective consideration of all of them, provides an extraordinary showing of Congress's intent to except felon disenfranchisement from the scope

226. *Id.* at 317. In 1964, Congress had banned poll taxes by enacting the Twenty-Fourth Amendment. *Id.* at 317 n.13. Other practices developed in the months that followed in a continuing effort by states in the post-Reconstruction South to dilute African-American voting numbers. *Id.*

227. *Id.* at 318–19.

228. *Id.* at 319.

229. *Id.* at 319–20.

230. *Id.* at 320 n.16.

231. *Id.* at 320–21.

232. *City of Mobile*, 446 U.S. 55.

233. *Hayden*, 449 F.3d at 320–21.

234. *Id.* at 322–23.

235. *Id.* at 317–23.

of Section Two.

Although there is a long history of approval for the practice of disenfranchising felons,[236] it does not lend credence to the court's position that because felon disenfranchisement was not up for debate at the time of the amendment of the statute; race was. Testimony and statements by legislators were limited to implementing a results test for plaintiffs' claims in order to ensure the right to vote in all members of racial minorities.[237] The congressional record indicates that Congress was concerned with ensuring that no voting test or requirement discriminated based on race.[238] Had Congress intended that felon disenfranchisement be the lone exception to its "no voting requirement" rule, it is likely that some member of Congress would have mentioned that in the congressional record and floor debates.[239] No member of Congress mentioned felon disenfranchisement during the debate on the amendments, but there is significant comment about how *any* voting test that results in racial discrimination would violate the statute.[240]

Second, the court cited to Congress' passage of a felon disenfranchisement statute for the District of Columbia in the years following the enactment of the original Voting Rights Act to prove that Congress could not have intended to place felon disenfranchisement within the reach of Section Two.[241] Again, the court misconstrues the reach of the statute. Section Two does not invalidate the fundamental lawfulness of felon disenfranchisement. Instead, Section Two only works to eradicate racial discrimination in voting requirements. If felon disenfranchisement results in racial discrimination, then it would be invalid under Section Two, but there is no indication Congress made any such analysis.[242] It can only be assumed that, at the time it enacted a felon disenfranchisement statute in the District of Columbia, Congress did not believe that it was purposefully drawing a statute that would result in racial discrimination. Rather, it drew a statute that mimicked the felon disenfranchisement laws already in existence in a vast majority of the states.[243]

Finally, the court argued that if Congress had intended felon

236. *Id.* at 316–17.

237. S. Rep. No. 97-417, *supra* note 129, at 1–4.

238. *See generally id.*

239. *See Hayden*, 449 F.3d at 367-68 (Sotomayor, J., dissenting) (arguing that if Congress intended for felon disenfranchisement to be excluded from Section Two of the Voting Rights Act, it could have stated so in the text or comments of the statute).

240. *See generally* S. Rep. No. 97-417, *supra* note 129.

241. *Hayden*, 449 F.3d at 320.

242. *See generally* S. Rep. No. 97-417 *supra* note 129.

243. *Id.*

disenfranchisement to fall within the reach of Section Two, there would have been statements made to that effect in the congressional record.[244] While, admittedly, the court is correct that no statements were made to specifically *include* felon disenfranchisement within Section Two, it is also correct that no statements were made to specifically *exclude* felon disenfranchisement from Section Two.[245] Instead, members of Congress were concerned that some other electoral devices that had been in place for decades, such as at-large elections, might be ruled unlawful under the 1982 amendments.[246] The congressional record indicates, however, that "[e]lectoral devices, including at-large elections, per se would not be subject to attack under Section [Two]. They would only be vulnerable, if, in the totality of the circumstances, they resulted in the denial of equal access to the process."[247] This statement of Congress is directly analogous to felon disenfranchisement. Both at-large elections and felon disenfranchisement were standard practice in states throughout the country at the time of the amendments.[248] Because the language of Section Two applies to all voting requirements, both would presumably fall within the reach of Section Two. Members of Congress were concerned that Section Two would invalidate at-large elections, but the Senate Report makes it clear that those elections would only be unlawful where they result in racial discrimination.[249] The same principle is applicable to felon disenfranchisement. Section Two would not invalidate felon disenfranchisement, inherently, unless the practice of disenfranchising felons results in vote denial or dilution on account of race.

Although the court in *Hayden* was convinced that Congress did not intend for felon disenfranchisement to fall within the purview of Section Two, its analysis falls short of the "extraordinary showing" necessary to prove Congress intended something other than the plain meaning of the statutory text.[250] Logically, if Congress intended for felon disenfranchisement to be excluded from Section Two, it would have stated so either in the statute itself or in the Congressional chamber at the time of the enactment of the amendments.[251] Indeed, as then circuit judge Sotomayor stated in her dissenting opinion in

244. *Hayden*, 449 F.3d at 320–21.

245. *See generally* S. Rep. No. 97-417 *supra* note 129.

246. *Id.*

247. *Id.* at 17.

248. *Id.*

249. *See id.* at 1–16.

250. *Hayden*, 449 F.3d 305 (2nd Cir. 2006).

251. *See id.* at 367–68 (Sotomayor, J., dissenting) (arguing that if Congress intended for felon disenfranchisement to be excluded from Section Two of the Voting Rights Act, it could have stated so in the text or comments of the statute).

Hayden,[252] the "[majority's] 'wealth of persuasive evidence' that Congress intended felony disenfranchisement laws to be immune from scrutiny under [Section Two] . . . includes not a single legislator actually saying so."[253]

In determining what constitutes an "extraordinary showing" of contrary intent, the Supreme Court has stated that "Committee Reports are 'more authoritative'"[254] and in many cases, is the only thing courts should consider.[255] The Senate Reports here are clear: The Congressional focus in drafting the 1982 amendments was to eradicate racial discrimination resulting from *any* voting requirement. Because felon disenfranchisement is a voting requirement, by its own words, Congress intended felon disenfranchisement to fall within the reach of Section Two. Thus, there can be made no extraordinary showing that Congress intended to exclude felon disenfranchisement from consideration, and the plain meaning of the statute — that it applies to all voting qualifications and requirements — dictates that Section two applies to felon disenfranchisement.

B. Felon Disenfranchisement Results in Denying Individuals the Right to Vote on Account of Race

Once it is determined that Section Two of the Voting Rights Act applies to felon disenfranchisement provisions, the analysis of whether felon disenfranchisement practices are unlawful turns on whether that practice has the result of denying an individual's right to vote on account of race.[256] It has been decades since the Supreme

252. Justice Sotomayor's opinion was not long — a mere three short paragraphs, in fact — but, according to Justice Sotomayor, that is all the analysis that was required. *Hayden*, 449 F.3d at 367. In dissenting from the majority decision which held that the Voting Rights Act does not apply to felon disenfranchisement, *Id.* at 328, Justice Sotomayor filed a "separate opinion only to emphasize one point," *Id.* at 367. She feared "that the many pages of the majority opinion and concurrences — and the many pages of the dissent that are necessary to explain why they are wrong — may give the impression that this case is in some way complex. It is not." *Id.* Justice Sotomayor's analysis was decisively and unambiguously conclusive: the Voting Rights Act "applies to all 'voting qualifications[,]'" and undoubtedly, felon disenfranchisement laws place a voting qualification on a group of people. *Id.* at 367–68. Accordingly, the Voting Rights Act applies to felon disenfranchisement. *Id.* at 368. Justice Sotomayor went on to argue that "[t]he duty of a judge is to follow the law[.] . . . Congress [does not] wish [ ] [the Court] to disregard the plain language of any statute or to invent exceptions to the statutes it has created." *Id.*

253. *Hayden*, 449 F.3d at 368 (Sotomayor, J., dissenting).

254. *Garcia*, 469 U.S. at 76 (quoting United States v. O'Brien, 391 U.S. 367, 385 (1968)).

255. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring).

256. 42 U.S.C. § 1973 (1965 & Supp. 1982). The concept of vote denial is not a new one in American law, *see, e.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), however, the Supreme Court has

Court has considered a vote denial claim such as the ones alleged by plaintiffs in felon disenfranchisement cases, and currently, no standard test or analysis exists that would guide courts in their consideration of vote denial claims. However, the Court, in *Thornburg v. Gingles*, considered, and developed a test against which courts may analyze, vote dilution claims.[257] Based on the inherent similarities between vote denial and vote dilution claims, this article argues that a modified vote dilution test should be imposed in vote denial cases.[258] This modified test would incorporate an analysis of the three principle concepts of vote denial and dilution: power, cohesion and submergence, and the fundamental right of citizens to vote. For felon disenfranchisement, the test requires an analysis of the Senate Factors drafted alongside the 1982 Voting Rights Act amendments.[259] These same Senate Factors were

never drafted a test by which courts could analyze such claims. Instead, during the 1950s and 1960s, the Court utilized what can best be described as an "eyeball test" to consider cases challenging statutes that imposed literacy tests and other voting requirements allegedly aimed at disenfranchising African Americans. In Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), for instance, the Court found that a literacy test appeared to be North Carolina's effort to "raise the standards for people of all races who cast the ballot," rather than a method by which the state could disenfranchise blacks. *Id.* at 54. Rather than determine whether the literacy tests impacted any single race, the court merely "eyeballed" whether the statute was clearly racially discriminatory. *See generally, id.* A similar test was imposed in Louisiana v. United States, 380 U.S. 145 (1965), where the Supreme Court ruled a more complex literacy test unconstitutional. *Id.* at 155. In that case, the Court cited ample evidence that qualified black voters had been excluded from the voting process because the State imposed a broad rule that allowed election officials to determine, without guidance, which individuals may vote. *Id.* at 150–51. The Court's "eyeball test" determined that the law logically appeared to be a purposeful deterrent from voting for blacks who were the subject of discrimination by poll workers. *Id.* at 150.

As purposeful discrimination became less obvious, the "eyeball test" of the 1950s and 1960s gave way to a more modern two-pronged test used from the late 1970s through the mid-1980s. Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 26 (2006); *see also* Tokaji, *The New Vote Denial*, *supra* note 12, at 719. Legislators became far savvier in developing laws, such as identification requirements and ballot technology measures, to disenfranchise blacks. *The New Vote Denial*, *supra* note 12, at 719. Although such restrictions appear raceneutral, and would thus pass an "eyeball test," they adversely and impermissibly impact African-American or minority communities. *Id.* Under the two-prong test, courts determined: first, whether the "events" or "episodes" complained of were significant such that they rose "to the level of 'voting practices or procedures[;]'" and, second, "whether the voting practices operated to deny [minorities] an equal opportunity to participate and elect candidates of their choice." Brown v. Post, 279 F. Supp. 60, 64 (W.D. La. 1968). Indeed, the two-prong test for vote dilution claims mimicked the results test later drafted as an amendment to the Voting Rights Act to include vote denial claims. *Compare id. with* 42 U.S.C. § 1973 (1965 & Supp. 1982).

257. *Thornburg*, 478 U.S. 30, 50–51. Vote dilution is the practice of imposing various voting restrictions on the citizens of a certain area that adversely impacts the strength of an otherwise politically powerful minority group. *See also* Tokaji, *supra* note 12, at 719.

258. *See infra* Part III.B.2.

259. *See infra* Part III.B.3.

contemplated in *Farrakhan II*, which ruled that felon disenfranchisement violated Section Two.[260] With the Senate Factors in mind, a thorough analysis of felon disenfranchisement under this proposed test shows that the practice denies citizens of the right to vote on account of race and is therefore unlawful under the Voting Rights Act.[261]

1. *The Supreme Court's Treatment of the Voting Rights Act Results Test Offers Guidance as to How to Analyze Vote Denial Claims Challenging Felon Disenfranchisement*

In *Thornburg v. Gingles*, the Supreme Court considered the results test of the Voting Rights Act for the first time.[262] In *Gingles*, the Court considered an act of the North Carolina General Assembly redistricting the state's legislative election districts.[263] African-American citizens challenged the redistricting plan under Section Two, arguing that the revision of legislative districts split communities with large populations of African-American voters into separate, neighboring districts with large populations of Caucasian voters, thereby "submerging [blacks] in a white majority."[264]

In its analysis of the Voting Rights Act claim, the Court stated that vote dilution claims — which often concern legislative districting — should be considered under a three-part test.[265] First, the court will ask whether the minority group is sufficiently large and geographically compact such that the minority group constitutes a majority in at least one district.[266] Second, the court will consider whether that minority group is politically cohesive (i.e., that members of that minority group generally vote for the same candidates).[267] Finally, the court will determine whether the majority group is sufficiently politically cohesive as to enable it to usually defeat the minority group's preferred candidate.[268] The test considers the minority group's power and cohesion, and whether the interests of the minority group are being submerged by a more powerful group.[269] "Satisfaction of the three *Gingles* factors serves as strong evidence that a jurisdiction employs a test or device that is

260. *Farrakhan II* at 1016.
261. *See infra* Part III.B.4.
262. *Thornburg*, 478 U.S. at 34.
263. *Id.*
264. *Id.* at 46.
265. *Id.* at 50–51.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

discriminatory in purpose or effect . . ."[270]

Under the *Gingles* test, the first prong is generally an objective consideration, where sheer population numbers may be sufficient proof.[271] It may be enough for a plaintiff to prove that minority voters' residences are generally segregated into homogenous communities rather than integrated relatively evenly amongst the majority voters' residences.[272] For the second and third prongs, the Court believed they could be satisfied under various factual circumstances, but that there did exist some general principles which pervade all inquiries.[273] Such factors include the presence of minority bloc voting and the consistency with which such bloc voting occurs.[274] Logically, "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are results of a single election."[275]

Districting is often used by the political party in power to reduce the likelihood of that party losing legislative seats in an election. While the concepts found in the *Gingles* test are specific to vote dilution claims because they involve districting, they translate well to vote denial, particularly regarding felon disenfranchisement. Both vote denial, as is applies to felon disenfranchisement, and vote dilution, involve a politically powerful group eliminating the vote effectiveness of a less powerful group. In essence, they both "implicate the value of participation."[276] Felon disenfranchisement dilutes the population of racial minorities from voting pools because much higher percentages of racial minorities are barred from voting through felon disenfranchisement. Although scholars have argued that vote denial and vote dilution are fundamentally different concepts,[277] their eventual result is the same: A minority group's voting interests are submerged to a majority group's through voting requirements.

One major area in which vote denial and vote dilution differ is that the right to vote is a fundamental one.[278] Courts have long considered the right to vote to be one of the foundations of our

270. Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 63 (2009).

271. *Thornburg*, 478 U.S. at 50 n.17.

272. *Id.*

273. *Id.* at 55–56.

274. *Id.* at 56–58.

275. *Id.* at 57.

276. Tokaji, *supra* note 12, at 719.

277. *See, e.g.*, *id.*; *See also* Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 373 (2006); Laughlin McDonald, *The Voting Rights Act and Vote Dilution*, 19 GA. L. REV. 459, 461 (1985).

278. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966).

process of governance.[279] In that respect, vote denial infringes upon one of the most important rights of citizens of this country. As scholars have noted, constitutional analyses on provisions that deny certain individuals the right to vote based on race require strict scrutiny from the Supreme Court.[280] Because vote dilution does not run afoul of a fundamental right, at least in the general sense, the strict treatment implies that an even more compelling justification for denying the right to vote to certain citizens be proven by the state. A modification of the *Gingles* test to incorporate portions of the strict scrutiny standard would provide that justification.

2. *A Modification of the Gingles Test Provides an Appropriate Guideline for Challenging Felon Disenfranchisement*

Although the *Gingles*[281] test does not specifically address vote denial claims, the inherent similarities between vote denial and vote delusion are clear. At the heart of the Supreme Court's analysis regarding vote dilution are the concepts of power, cohesion and submergence; these concepts exist equally in vote denial circumstances. The test proposed by this article, termed the Modified Gingles Test, includes each of those concepts: First, the excluded portion of a minority group represents a politically significant portion of the minority group to which it belongs; second, the excluded minority group is politically cohesive such that members of that minority group tend to vote for the same candidates or referenda; and third, removal of the voting restriction is reasonably likely to have an effect on the outcome of a local or national election. If a plaintiff is able to prove each of the three major concepts, the modified test incorporates a burden-shifting

fourth prong: the state must prove that the subject-voting requirement is narrowly tailored to serve a compelling state interest.[282]

279. Pamela S. Karlan, *The Right to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993).

280. Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318, 347 n.158 (2010). Notably, strict scrutiny is applied both to laws that affect fundamental rights, such as the right to vote, and to laws that burden members of a suspect classification, such as race. *Id.*

281. *Thornburg*, 478 U.S. 30.

282. Although the United States Court of Appeals for the Ninth Circuit, in *Farrakhan III*, enumerated a minimal standard under which felon disenfranchisement may be challenged on the ground that there exists racial discrimination in the criminal justice system, *see Farrakhan III*,

a. The Excluded Portion of the Minority Group Represents a Politically Significant Portion of the Local or National Electorate

Under the first prong of the Modified Gingles Test, the excluded individuals must represent a politically significant portion of their minority group on a local or national level. This prong is similar to the first prong of the *Gingles* test, as it relates to the political power of the minority group.[283] To determine whether a population of people constitutes a politically significant portion of a minority group, a court must look to the local population including and excluding the minority group. If the difference in the numbers of eligible voters of the minority group, after the voting requirement is imposed, prevents that minority group from playing a significant role in the electoral process, the excluded voters represent a politically significant portion of the electorate.

b. The Excluded Minority Group is Politically Cohesive Such that Members of that Minority Group Tend to Vote for the Same Candidates or Referenda

The second prong of the Modified Gingles Test would require that the excluded minority group is politically cohesive such that members of that minority group tend to vote for the same candidates or referenda. This prong is identical to the second prong of the *Gingles* test.[284] It requires the court to determine whether a significant portion of the minority group members tend to vote for the same candidates or ballot measures. This may be demonstrated by objective criteria such as individual statistical evidence in national, state and local elections or a history of previous and consistent racial bloc voting. In addition, this prong can be proven through circumstantial evidence, such as exit polls and witness testimony. This circumstantial evidence should be offered as support to further expound upon statistical evidence. To the extent a plaintiff only offers circumstantial evidence, such evidence would be highly suspect.

c. Removal of the Voting Restriction Is Reasonably Likely

623 F.3d 990 at 992–93, the test was created based on Fourteenth Amendment principles, rather than the Supreme Court's prior Voting Rights Act analyses. Accordingly, this article abandons the Ninth Circuit analysis in favor of the one described herein.

283. *Thornburg*, 478 U.S. at 50–51.

284. *Id.*

to Have an Effect on the Outcome of a Local or National Election

The third prong of the Modified Gingles Test asks whether removal of the voting restriction being challenged is reasonably likely to have an effect on the outcome of a local or national election. This prong tracks the third prong of the *Gingles* test to the extent it considers whether the voter restriction renders the minority group subject to the decisions of a more powerful majority.[285] If the difference in the voting population of the minority group is consistently likely to change the outcome of local or national elections, then the third prong of this test has been satisfied. In analyzing this prong, courts should consider the political environment of the challenged area. This prong is not designed to be satisfied if a single election may be affected by the voting requirement (such as the occasional election decided by a handful of votes). Rather, it is satisfied only where the recent election history of a given area shows that the minority group would make a difference in multiple elections. It would not be necessary, under this prong, to prove that the outcome of any given election would change; rather the minority group would have a significant effect on the process.

d. The Subject Voting Requirement Is Narrowly Tailored to Serve a Compelling State Interest

If an individual or group of plaintiffs prove the first three prongs of the Modified Gingles Test, the burden shifts to the State to prove that its interest in imposing the challenged voting requirement is a compelling one and that the voting requirement is narrowly tailored to serve that interest. This prong tracks the well-settled constitutional strict scrutiny standard of review courts apply to laws that infringe upon the right to vote.[286] While courts have never created a bright line rule to determine whether a state interest is compelling, these interests are generally described as vital, crucial and necessary state objectives.[287] To prove that a voting requirement is narrowly tailored, the State must impose the least restrictive means necessary to serve that interest. This prong would effectively challenge the Supreme Court's holding in *Richardson v. Ramirez*, *supra*, which held that a state need not prove a compelling interest in

285. *Id.*

286. *See* Sarah Stenberg-Miller, Comment, *Elections -- Nominations, and Primary Elections: The Supreme Court Finds that California's "Blanket Primary" Violates Political Parties' First Amendment Right of Association*, 77 N.D. L. REV. 827, 831 n.41 (2001).

287. *Id.*

order to deny those convicted of crimes the right to vote based on Section Two of the Fourteenth Amendment, which expressly permits felon disenfranchisement.[288] This prong, however, ensures that when the State attempts to infringe upon the right of its citizens to vote, the voting qualification must receive the most exacting analysis.[289]

3. *Under This Modified Gingles Test, Courts Must Consider the Senate Factors Drafted Alongside the 1982 Amendments to the Voting Rights Act*

To determine whether a voting restriction prevents a minority group from participating equally in the voting process, courts must consider the impact of the voting restriction on minority electoral opportunities through objective criteria.[290] When the Senate enacted the 1982 amendments to the Voting Rights Act, it also drafted a set of such objective factors to accompany them.[291] These Senate Factors have been used by various courts to consider voter challenges under the Voting Rights Act.[292] The Supreme Court's acceptance of the Senate Report Factors in myriad cases[293] implies that it would likewise utilize these Factors in other Voting Rights Act analyses addressing the results test.

Of the nine Senate Factors discussed by Congress in connection with the Voting Rights Act Amendments, six are of particular relevance to vote denial claims. The relevant Senate Factors to be considered by courts in these analyses include: the history of racial discrimination in the electoral process in the area; the racial polarization of current elections; the effect of discrimination of the minority group's access and experience in education, health, employment, and other areas of everyday life; the existence of race-based political campaign practices; the ability of racial minorities to achieve political office; and a lack of response to the needs of the minority community.[294] Of these, the Supreme Court has stated that

288. *Richardson*, 418 U.S. 24, 53.

289. The strict scrutiny standard is used on Equal Protection and Due Process challenges to fundamental rights or for laws that burden members of a suspect classification. While it is logical to assume that any challenge to voting qualifications will include a constitutional argument under the Equal Protection Clause and/or the Due Process Clause, the inclusion in the modified *Gingles* test reiterates the importance of the right to vote and ensures that courts treat voting requirements with the appropriate level of scrutiny.

290. *Thornburg*, 478 U.S. at 44.

291. S. Rep. 97-417 at 28–29 (1982).

292. League of United Latin Amer. Citizens v. Perry, 548 U.S. 399, 426 (2006); Holder v. Hall, 512 U.S. 874, 954 n.6 (1994); *Thornburg*, 478 U.S. at 69; *see also Farrakhan II*, 590 F.3d at 1018; Benavidez v. City of Irving, Texas, 638 F. Supp. 2d 709, 732 (N.D. Tex. 2009).

293. *Thornburg*, 478 U.S. at 36–37.

294. S. Rep. No. 97-417, *supra* note 129, at 28–29.

the most important factors relevant to vote dilution or vote denial challenges are the ability of minority candidates to reach political office and the racial polarization of voting practices in the area.[295] The other factors are considered "supportive of," but not essential to, a vote denial claim.[296] A reviewing court is not bound by the Factors and may include additional factors not contemplated by Congress or modify the Factors as appropriate.[297] The United States Court of Appeals for the Ninth Circuit did just that when it analyzed Senate Factor five in *Farrakhan II*.[298]

In *Farrakhan II*, the court ruled that the plaintiffs' compelling evidence of racial disparity in the criminal justice system should be considered under Senate Factor five, and that it was sufficient to prove, in that case, that felon disenfranchisement violates Section Two of the Voting Rights Act.[299] The court concluded that the plaintiffs had offered "compelling, direct" statistical evidence of racial discrimination in the criminal justice system, which the court found sufficient to tip the totality of the circumstances analysis in plaintiffs' favor, proving that felon disenfranchisement has the result of denying citizens the right to vote on account of race.[300] Although the plaintiffs were unable to show any other Senate Factors were implicated by their evidence, the court recognized that the plaintiffs' evidence of Senate Factor five was so compelling as to be sufficient to prove their case.[301] The Ninth Circuit's use of Senate Factor five is also instructive for an analysis under the Modified Gingles Test described herein.

4. *With the Senate Factors in Mind, Under the Modified Gingles Test, Felon Disenfranchisement Has the Result of Denying the Right to Vote on Account of Race*

The final question in an analysis of whether felon disenfranchisement practices violate Section Two of the Voting Rights Act must turn on whether it can be proven with sufficient certainty that felon disenfranchisement denies citizens of this country the right to vote "on account of race . . ."[302] Previously, the Court has been reluctant to find widespread racial bias in the criminal justice system, because the impact of such a ruling would

295. *Thornburg*, 478 U.S. at 48 n.15.
296. *Id.*
297. *Farrakhan II*, 590 F.3d at 1004; *see also* S. Rep. No. 97-417, *supra* note 129, at 29.
298. *Farrakhan II*, 590 F.3d at 1005 n.20.
299. *Id.* at 1016.
300. *Id.*
301. *Id.* at 1004.
302. 42 U.S.C. § 1973 (1965 & Supp. 1982).

have a colossal impact on other parts of the criminal justice system.[303] "The roadblocks to reform of racially biased and other unfair and unconstitutional practices and policies in the criminal justice system that have emerged . . . are daunting. The Supreme Court has placed significant obstacles to the pursuit of racial justice and equality in the criminal justice system."[304] Moreover, appellate courts have generally avoided discussing racial bias in the justice system.[305] Instead, the courts rely on the landmark decisions of other courts[306] — although few and far between — and the congressional efforts of various legislatures to reduce racial disparity in the criminal justice system. In addition, the Court is often unwilling to accept statistical evidence as proof that racial discrimination actually exists in the criminal justice system.[307] Often, proof of racial discrimination is only available through statistics, thus it is a difficult task for plaintiffs to garner the relief they seek. Under the Modified Gingles Test proposed in this article, a more uniform analysis of racial discrimination in voting practices could result.

Under the Modified Gingles Test, plaintiffs in challenges to facially race neutral voting restrictions must prove that: (a) the excluded minority group represents a politically significant portion of that minority group; (b) the excluded minority group is politically cohesive such that members of that minority group tend to vote for the same candidates or referenda; (c) removal of the voting restriction is reasonably likely to have an effect on the outcome of local or national elections.[308] If all three prongs of the test are met, the burden shifts to the State to prove that the challenged voting restriction is narrowly tailored to serve a compelling state interest.

In order to succeed on a challenge to a state felon disenfranchisement provision, a group of plaintiffs must first prove that they are members of a minority group and that they represent a politically significant portion of that minority group. According to the Sentencing Project, a research and advocacy group seeking repeal of felon disenfranchisement laws throughout the country, "[m]ore than [sixty percent] of the people in prison are now racial

303. *See, e.g.*, *McCleskey*, 481 U.S. at 314–15.

304. David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 97 (2007).

305. William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 HAMLINE L. REV. 235, 239 (2002).

306. Cases such as *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that race could not be a factor in removing potential jurors from jury pools), are indicative.

307. *See McCleskey*, 481 U.S. at 293–95.

308. *See supra* Part III.B.2.

minorities."[309] This statistic has a profound effect on voting rights due to felon disenfranchisement provisions. While only approximately two percent of the United States' total population is disenfranchised due to felony conviction, a significant portion of the African-American population — more than eight percent, or about two million blacks — is disenfranchised.[310] No state disenfranchises a higher percentage of whites than blacks.[311] For instance, in Mississippi, 13.2% of the African-American population is disenfranchised; in Alabama, the percentage is 15.3.[312]

Throughout this country, one thing is consistent when it comes to felon disenfranchisement — a significant portion of the African-American population is being disenfranchised. In all but two states that disenfranchise felons, at least two percent of the African-American population is disenfranchised.[313] At least five percent are disenfranchised in thirty-one states, and sixteen states disenfranchise at least ten percent of blacks.[314] Because most African Americans vote cohesively, the large numbers of African Americans disenfranchised from voting is politically significant.

The second prong of the Modified Gingles Test requires plaintiffs challenging voting requirements to prove the political cohesion of the minority community.[315] In recent presidential elections, African Americans have voted overwhelmingly for Democratic candidates.[316]

The final prong which plaintiffs must prove in vote denial challenges to felon disenfranchisement under the Modified Gingles Test is that removal of the subject vote requirement is reasonably likely to have an effect on local or national elections.[317] Blacks are disenfranchised at eight times the rate of whites, and as of 2005, over

309. *Racial Disparity*, THE SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=122 (last visited Nov. 30, 2010).

310. *Interactive Map*, THE SENTENCING PROJECT, http://www.sentencingproject.org/map/map.cfm (last visited Nov. 30, 2010).

311. *Id.* (click on each state to see individual state data)

312. *Interactive Map*, THE SENTENCING PROJECT, http://www.sentencingproject.org/map/statedata/cfm?abbrev=MS&mapdata=true (last visited Nov. 30, 2010). In Mississippi and Alabama, respectively, approximately four percent of each state's total population is comprised on disenfranchised African Americans. *Id.*

313. *Id.*

314. *Id.*

315. *See supra* Part III.B.2.b.

316. David A. Bositis, *The Black Vote in 2004*, JOINT CTR. FOR POLITICALAND ECON. STUDIES, 8 (2005). Al Gore received over ninety percent of the African-American vote in the 2000 presidential election. *Id.* John Kerry received approximately eighty-eight percent of the black vote four years later. *Id.* Barack Obama received over ninety-six percent of the black vote in the 2008 presidential election. David Paul Kuhn, *Exit Polls: How Obama Won*, POLITCO (Nov. 5, 2008), http://www.politico.com/news/stories/1108/15297.html.

317. *See supra* Part III.B.2.c.

twenty percent of the black population in at least seven states was disenfranchised.[318] With as many as two million African-American men nationally disenfranchised from the right to vote due to commission of a felony,[319] and a vast majority of African Americans voting cohesively for Democratic candidates and socially conservative referenda,[320] the number of votes that would be cast absent felon disenfranchisement provisions is staggering.

"Because African Americans are overwhelmingly Democratic Party voters, felon disenfranchisement erodes the Democratic voting base by reducing the number of eligible African American voters."[321] Considering that white felons typically are working class individuals who also vote Democratic, the effect of felon disenfranchisement is even more significant.[322] It is hypothesized by some social scientists that as much as seventy percent of disenfranchised felons would vote for Democratic candidates if they were allowed to vote.[323] In a two-party system of election, like the one that exists in the United States, where the winner of an election needs to garner a simple majority of the votes cast in a single election, a small number of votes can have a profound impact on the outcome.[324] Given this information, it is clear that the impact of felon disenfranchisement on elections is significant, and the disenfranchisement of African Americans has an effect on the election process.

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318. *Interactive Map*, THE SENTENCING PROJECT, http://www.sentencingproject.org/map/map.cfm. In Iowa, over one-third of the black population was disenfranchised, whereas less than five percent of the white population was. *Id.*

319. *Id.*

320. *See supra* Part III.B.4.

321. CHRISTOPHER UGGEN & JEFF MANZA, THE POLITICAL CONSEQUENCES OF FELON DISENFRANCHISEMENT LAWS IN THE UNITED STATES 6 (2001).

322. *Id.*

323. *Id.* at 15.

324. *Id.* at 8. In a statistical survey of past presidential, gubernatorial and senatorial elections, which analyzed voter turnout and voter preference, felon disenfranchisement likely affected the outcome of at least one presidential election. *Id.* at 23-25. John F. Kennedy's victory in 1960, Jimmy Carter's victory in 1976 and George W. Bush's victory in 2000 likely all would have been greatly impacted had felons been afforded the right to vote in those elections. *Id.* at 24-27. Because they were Democratic candidates, Kennedy and Carter would likely have won by far wider margins, whereas Bush, the Republican candidate, likely would have lost his elections. *Id.* at 24–27. Four gubernatorial elections would likely have been impacted. *Id.* at 27–28. In all four cases, Republicans won elections for governor, but had felons been permitted to vote, all four elections would likely have swung into the Democratic column. *Id.* Finally, four senatorial elections would likely have different results. *Id.* at 17–20. Again, Republican victories would have been reversed in favor of Democratic candidates in all four Senate races. The resounding effect of these victories would mean that Democrats controlled the Senate throughout the 1990s, rather than the Republicans. *Id.* at 18–19. These statistics showed that, in its present condition, "felon disenfranchisement, combined with rapid growth in the size of the disenfranchised population," often alters elections, particularly on state and local levels, where elections can be decided by mere handfuls of votes. *Id.* at 28.

Once a group of plaintiffs have proven the three prongs of the Modified Gingles Test, the burden would shift to the state to prove that felon disenfranchisement is narrowly tailored to serve a compelling government interest and that it imposes only the least restrictive means necessary to achieve a vital, necessary government objective.[325] Historically, in voting rights cases, the government has offered as a compelling interest the need for the government to regulate the voting and electoral process.[326] Admittedly, this argument will likely pass muster as a compelling governmental interest upon review by courts, given the historical approval of such an argument. Courts have consistently approved any reasonable interest announced by the State related to voting rights as compelling.[327]

On the other hand, it would be very difficult for the state to prove that felon disenfranchisement is narrowly tailored to serve the state's regulation of the political process.[328] The narrow tailoring requirement insists that the state prove that no less restrictive method for achieving the interest exists.[329] Indeed, in considering felon disenfranchisement and the narrow tailoring requirement, Justice Thurgood Marshall, in *Richardson v. Ramirez*, stated that felon disenfranchisement was not narrowly tailored to achieve any government interest, no matter how compelling.[330]

One of the reasons it would be difficult for a court to determine that felon disenfranchisement is narrowly tailored to serve a compelling government interest is because the practice of disenfranchising felons is accomplished through several different methods. Some states disenfranchise felons for life, which almost assuredly could not be narrowly tailored, as the regulation of the electoral system would likely not suffer by felons who have completed their sentence, parole and probation requirements voting.

325. *See supra* Part III.B.2.d.

326. *See* William R. Kirscher, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 690–91 (1995) (discussing how courts have found compelling state interests in promoting the stability of the political system; promoting an educated electorate; maintaining the integrity of the election process; and regulating the manner in which representatives are elected). The Court has also considered protecting against voter fraud to be a compelling interest. *See e.g., Richardson*, 418 U.S. 24.

327. *Id.*

328. *See* Matthew D. Bunker, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL'Y 1, 23 (2004) (arguing that the narrow tailoring prong of constitutional scrutiny tests is difficult to meet).

329. *Id.*

330. *Richardson*, 418 U.S. 24, 79–83 (Marshall, J., dissenting). On the other hand, "Marshall found that ex-felons do have an interest in the democratic process, and they cannot be excluded based on the substance of the votes they would (presumably) cast." Jason Schall, 22 HARV. BLACKLETTER L.J. 53, 61 n.88 (2006).

Evidence of this fact is that other states successfully impose less-restrictive means to achieve the state interests, such as disenfranchising felons only during the terms of their incarceration or disenfranchising felons only prior to the completion of their parole and probation periods.[331] In addition, narrow tailoring is difficult to prove with felon disenfranchisement because thousands of individuals vote every election by absentee ballot. Incarcerated individuals would not need to leave their prison cells to file their ballots, and the practice of voting by absentee ballot, given its popularity in today's society, does not appear to compromise the electoral system in any significant way. Both of these practices present less-restrictive alternatives to an outright ban on felon voting, and absentee balloting presents a less-restrictive alternative to felon disenfranchisement in general. Accordingly, the state would not likely be able to prove that felon disenfranchisement is narrowly tailored to serve a compelling government interest, and felon disenfranchisement provisions would fail the Modified Gingles Test.

Conclusion

Although the right to vote has always been one of the most fundamental rights known to citizens of this nation,[332] since the creation of this country, felons have been barred from the elective franchise.[333] These disenfranchisement practices adversely impact racial minorities, and significant percentages of African-American, Latino and Native-American voters are unable to participate in the election process.[334] In the early twenty-first century, as the public learned about the impact of felon disenfranchisement on the electoral process, public support for re-enfranchisement began to rise,[335] but the court system, which has been given the opportunity to eliminate felon disenfranchisement through judicial decree, has thus far been reluctant to take the next step towards voter equality for all. The Supreme Court has rejected constitutional equal protection challenges to felon disenfranchisement, armed with the language of the Fourteenth Amendment, which specifically permits denying voting rights to felons.

Adverse Supreme Court rulings have left only one remaining argument by which felons may reasonably seek vote equality. Under

331. *See supra* notes 10–11 and accompanying text.

332. Gardner, *supra* note 4, at 437 (citing Common Clause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009)).

333. Brisman, *supra* note 31, at 331 (citing Ewald, *supra* note 9, at 1059–66).

334. *Id.*

335. Manza, *supra* note 46, at 283.

the Voting Rights Act amendments of 1982, disenfranchised felons have attempted to argue that felon disenfranchisement results in the denial of their right to vote on account of race. Courts have been reluctant to take this position, and the Supreme Court has largely avoided the issue to date. However, a favorable decision from the Ninth Circuit has breathed new life to the movement to end felon disenfranchisement. The time has come for the Supreme Court to determine whether felons are entitled to the same fundamental rights afforded other citizens of this country. The time has come to save felons from suffering without suffrage.